

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

ASSIA BOUNDAOUI, ) Docket No. 17 C 4782  
)  
Plaintiff, ) Chicago, Illinois  
) June 20, 2019  
v. ) 9:36 a.m.  
)  
FEDERAL BUREAU OF INVESTIGATION )  
and UNITED STATES DEPARTMENT OF )  
JUSTICE, )  
)  
Defendants. )

TRANSCRIPT OF PROCEEDINGS - Status  
BEFORE THE HONORABLE THOMAS M. DURKIN

APPEARANCES:

For the Plaintiff: MS. ALEXA POLETTI (via telephone)  
Sidley Austin LLP  
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New York, NY 10019

For the Defendants: MS. MARCIA K. SOWLES  
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1 (In open court.)

2 THE CLERK: 17 C 4782, Boundaoui v. FBI.

3 And I need to get Ms. Poletto on the phone.

4 (Clerk places telephone call.)

5 MS. POLETT0: Hello. This is Alexa.

6 THE CLERK: Hi. Good morning. It's Sandy with Judge  
7 Durkin calling on 17 C 4782, Boundaoui v. FBI.

8 THE COURT: All right. Good morning.

9 MS. POLETT0: Hi.

10 THE COURT: Let's have --

11 MS. POLETT0: Good morning.

12 THE COURT: -- everyone -- everyone identify  
13 themselves for the record, starting first with the person on  
14 the phone.

15 MS. POLETT0: This is Alexa Poletto. I'm an attorney  
16 for the plaintiff.

17 And I apologize. My client called in on the usual  
18 dial-in. I don't know if it's possible to open that line or if  
19 I should conference her in. We thought we would be using the  
20 Court's dial-in, because she's, I think, on that line.

21 THE COURT: Uh ...

22 THE CLERK: Did I do a minute order that said for  
23 everybody to call in on that line?

24 MS. POLETT0: You did not, and I apologize.

25 THE CLERK: I have to know in advance.

1 THE COURT: Yeah.

2 MS. POLETTO: Okay. That's fine. We'll just proceed  
3 as you like. Sorry. Sorry, your Honor.

4 THE COURT: Okay. And let's have the attorneys in  
5 court identify themselves.

6 MS. SOWLES: Marcia Sowles from the Department of  
7 Justice.

8 THE COURT: All right. Good morning.

9 MS. WAWZENSKI: And Linda Wawzenski from the  
10 U.S. Attorney's Office on behalf of defendants.

11 THE COURT: All right.

12 Good morning, Ms. Sowles. I heard you on the phone a  
13 lot. You've never been to court before.

14 MS. SOWLES: Right.

15 THE COURT: So good morning.

16 Okay. We're up on your motion for partial summary  
17 judgment. And there was an objection -- a letter objection  
18 filed by the plaintiff to two -- on two issues. The first is  
19 that -- whether or not there was -- asking opposing counsel  
20 whether there's an objection to the motion. Is there an  
21 objection to the motion by plaintiffs?

22 MS. POLETTO: Yes, there is, your Honor.

23 THE COURT: All right. Well, we solved that. There  
24 is an objection, so this is not an uncontested motion.

25 The other is this summary judgment practice, which I

1 will candidly admit is not in the Federal Rules of Civil  
2 Procedure. It's an idiosyncrasy I have that I picked up from a  
3 judge in this building who has since passed away, Judge Shadur,  
4 where he always wanted parties -- typically, in many cases,  
5 parties to explain why they were going to file a summary  
6 judgment motion. And I often have a chambers conference in  
7 advance.

8 Not on every case. I don't do it on pro se cases. I  
9 don't do it on other cases where it's obvious a summary  
10 judgment motion should be filed.

11 But I do it a lot of times in cases like civil rights  
12 cases, excessive force cases where it's -- I really want to  
13 hear from the lawyers why there's a contested factual issue  
14 rather than going through the expense and time of preparing a  
15 summary judgment motion that may be doomed to failure.

16 So although it is a procedure on my web page, it was  
17 not followed here. I know Ms. Sowles has repeatedly said these  
18 cases are typically resolved by summary judgment. I'm not  
19 going to strike the motion and order this chambers conference  
20 to take place when we can just talk about it right now.

21 MS. SOWLES: Okay. Your Honor, actually, at the --  
22 you know, our last status conference, I indicated that we would  
23 be filing a motion for summary -- partial summary judgment.  
24 And you had said that while, you know, you're not required --  
25 you know, requiring, you explicitly stated that "If you want to

1 accompany it with this motion for summary judgment, you're free  
2 to do so." So that's what we did.

3 As we explained, that -- you know, some -- that  
4 Freedom of Information cases, and as we cited in our brief, are  
5 routinely resolved on summary judgment. And that's really  
6 because they're -- that they're not like -- I think, you know,  
7 that they're -- although they involve documents, it's not a  
8 discovery matter. The old -- it's a -- you know, it relies on  
9 a statute and that the -- there's basically three questions:

10 First of all, did the request reasonably describe the  
11 records sought? Second, was there a reasonable search for the  
12 records? And, third, if there are exemptions claimed and  
13 they're contested, were those exemptions proper?

14 And that's a -- you know, we're at a stage here where  
15 we believe that, you know, it's -- I mean, these are issues  
16 that are resolved by summary judgment. And we have filed a  
17 motion for summary judgment. If the plaintiff has -- you know,  
18 is contesting it, that's the proper procedure that it's  
19 resolved. And I -- they're really sort of, like, you know,  
20 administrative, you know, procedure-type cases.

21 They're -- you know, it's not a case where there is,  
22 you know, a substantive, you know, complaint as to whether or  
23 not, you know, a particular investigation was improper.  
24 They're not like discrimination cases or tort cases.

25 The -- you know, the ultimate issues are just those

1 three that I described, and those are issues that are properly  
2 resolved by summary judgment. And we filed our motion. If  
3 the -- you know, we believe that the proper way to proceed is  
4 to set a -- a briefing schedule.

5 THE COURT: Well, I'll give plaintiffs a chance to  
6 respond, but I have two questions. One is you represented in  
7 your motion that all of your compliance with the FOIA requests  
8 would be by -- I think by now, by today --

9 MS. SOWLES: Right. And --

10 THE COURT: -- or by earlier this week.

11 MS. SOWLES: Yeah, and we did.

12 In compliance with your order, all the agencies that  
13 had been referred documents for consultation reviewed those  
14 documents, and by June 7th.

15 But it took a long -- a little time for FBI to  
16 actually consolidate. And the -- they sent out their response  
17 on the 14th by Express Mail, and it was received by plaintiff's  
18 counsel on Monday.

19 THE COURT: All right.

20 And, Ms. Poletto, do you agree? Did you receive those  
21 documents?

22 MS. POLETTTO: We received them over a week late, your  
23 Honor, later -- a week later than your Honor had ordered them.  
24 That's correct, sir --

25 THE COURT: All right. But you've got them --

1 MS. POLETTO: -- your Honor.

2 THE COURT: You've got them now.

3 MS. POLETTO: Yes.

4 THE COURT: Okay. Now, the other question I had --  
5 then I'll give plaintiff's counsel a chance to respond. The  
6 other question is, why do you call it a partial motion for  
7 summary judgment?

8 MS. SOWLES: Okay. Your Honor, as I said, there's  
9 three questions.

10 One is do -- does the request reasonably describe the  
11 records sought, and with regard to portions of that, that's an  
12 issue.

13 Second, with regard to the portion where she wanted  
14 the file for Operation Vulgar Betrayal, was there a reasonable  
15 search for that. The only issue that we're not seeking summary  
16 judgment at this time is on the exemptions claimed. And that's  
17 because there's, you know, 33,000 pages and that many of the  
18 pages have redactions. And we've just completed the search.

19 We would hope that we could narrow the issue  
20 because -- and we're providing plaintiff time to identify what  
21 issues, if any, you know, withholding she's going to challenge.  
22 We've -- so that would be an issue that would be resolved  
23 later.

24 The reason that it's in this -- we're seeking partial  
25 summary judgment at this time is that plaintiff had been

1 raising the issue of whether or not we should be searching for  
2 this unidentified investigation that she believes was  
3 somehow -- continued the work.

4 And because that's an issue and, you know, we've --  
5 we're filing summary judgment -- partial summary judgment on  
6 that case and also on the reasonable search, that, you know, we  
7 conducted a search for the file and, you know, we explained  
8 that in great detail in the declaration of David Hardy.

9 So those are the -- you know, we feel it's ripe. I  
10 mean, you know, those two issues are ripe, and this would  
11 then -- there's no reason to, you know, continue, you know,  
12 this -- the dispute over whether we've done that.

13 THE COURT: All right. Ms. Poletto, I'll hear your  
14 response really to -- not to the substantive issues that are  
15 raised in the summary judgment motion, but whether there's a  
16 reason not to simply set a briefing schedule on this at this  
17 time.

18 MS. POLETT0: Absolutely. Thank you, your Honor.

19 I'd like to note that the government has actually not  
20 responded, in our opinion, to your order of one month ago --  
21 or, actually, more than one month ago, May 7th, your Honor.

22 You had ordered a declaration from an FBI agent, an  
23 affidavit, [unintelligible] investigation associated with or  
24 continued the work of Operation Vulgar Betrayal. And the  
25 government didn't do that. If you look at the declarations,



1 they simply said that OVB was closed and not reopened.

2 So the very order, your Honor, has not even been met.  
3 And -- and so in the first instance, I do take issue with that,  
4 and I'm happy to address it because I have detailed  
5 information, your Honor, as to why this is just -- it's not  
6 possible.

7 So they haven't answered your question. And all I can  
8 deduce from that, your Honor, is that in being unable to answer  
9 your order, this investigation, the associated investigation  
10 that continued the work of OVB, does, in fact, exist. And so  
11 that's the first issue here, your Honor.

12 The second is we do not think there was sufficient  
13 detail in these affidavits as to how it was explored. It does  
14 say that they were closed and why they know it was closed. We  
15 never disputed that OVB was closed, your Honor.

16 Our issue is that there is an associated investigation  
17 that continued the work of. We noted in the prior hearing when  
18 we met before your Honor that this investigated Muhammad Salah.  
19 There are court documents that indicate Muhammad Salah was  
20 indicted. So if the government is saying that there was no  
21 investigation that resulted in the indictment of Muhammad  
22 Salah, I find that very difficult to believe.

23 So in the first instance, your order was not met. In  
24 the second instance, the government said that they -- if  
25 they -- if they were going to file a motion for partial summary

1 judgment, that was going to be in July because there were  
2 various holidays that people were going on. And this, instead,  
3 was filed on June 7th before the final production was even  
4 provided.

5 So, in summary, in our view, in the great -- in the  
6 big picture, your Honor, this -- this -- this request is not  
7 completed, not even close to being completed. The documents  
8 have not been produced in the first instance.

9 Second, we do not think these affidavits are  
10 sufficient, and we believe that should be remedied because the  
11 government did not follow your order.

12 And, third, importantly, the issue of waivers that  
13 your order -- your Honor ordered to be addressed has not been  
14 sufficiently addressed, in our view. The government has still  
15 not returned one file responsive to someone who was  
16 investigated during Operation Vulgar Betrayal. You know,  
17 plaintiff's own mother was investigated and interviewed in  
18 this, and they never returned her file.

19 I just find this an insufficient response to your  
20 order. I think that this motion for partial summary judgment  
21 is incredibly premature and goes against your court -- your  
22 Honor's own rules. And so, you know, the fact that this is --  
23 this is our -- this is our view.

24 I'm happy to go into -- you know, I can list for the  
25 Court, and I'm going to submit a letter after this hearing from

1 my client of all the public documents that indicate the subject  
2 of Operation Vulgar Betrayal. Muhammad Salah was indicted in a  
3 later case, *U.S.A. v. Marzook*, and the public documents  
4 indicate that these -- that that -- that indictment was  
5 directly related to Operation Vulgar Betrayal.

6 For the government to say that there was no associated  
7 investigation I find -- I'm very surprised to hear that. And I  
8 don't think that the FBI's affidavit answered your question in  
9 our prior -- your order in our prior hearing.

10 THE COURT: Well, there's two -- two issues you're  
11 raising. One is if I issued an order -- you've got the  
12 transcripts. I haven't reviewed them. If you -- if I issued  
13 an order that has not been complied with and I put a date for  
14 it, as long as it's not a trivial blowing of the date, which is  
15 not going to be something that's going to be sanctioned, as  
16 long as it's -- but if you believe there's been a disregard of  
17 an order, then you file a rule to show cause.

18 The question of whether there was a follow-up  
19 investigation or other investigations or that the compliance  
20 you've gotten has been incomplete is probably something you can  
21 address in your response to the summary judgment motion.

22 If you think the affidavit is deficient, if you think  
23 that the documents they've turned over can't possibly be  
24 everything that is there or that the -- that the request asks  
25 for more than what they think they are obligated to give you,

1 that really is what they're basing their summary judgment  
2 motion on, and you simply oppose it.

3 And then I -- I -- like any other summary judgment  
4 motion, I see if there's a fact issue raised or not.

5 I think these are all bench trials, aren't they?

6 MS. WAWZENSKI: There's really never a trial, Judge.  
7 I mean, these are like administrative record reviews --

8 THE COURT: Yeah.

9 MS. WAWZENSKI: -- in which there is a record. And  
10 the record here would be the documents that we've presented,  
11 along with a *Vaughn* index, which is the index that indicates  
12 what exemptions we have invoked. And then it's usually  
13 cross-motions for summary judgment.

14 There is no trial. There are no depositions. There  
15 are no interrogatories. It's -- it's like a record review.

16 THE COURT: Okay. So it's -- it's almost a bench  
17 trial without witnesses because it's -- if there are fact  
18 disputes that come up, I need to resolve them in the context of  
19 a cross-motion or in the context of your opposition that's  
20 going to be filed.

21 So I -- I think if -- if there's a disregard of the  
22 order, the -- the remedy is to file a rule to show cause.

23 If there is a -- I think you just need to file an  
24 opposition to this if you think that they are incorrect and  
25 have improperly conducted their search. I think they have an

1 interpretation of what your request was that may be different  
2 than yours, and that's something I need to resolve. I need to  
3 see the request. I need to see how they interpreted it and  
4 then how you believe it should be interpreted. And I -- I  
5 think that's how this has to go.

6 I'll ask first the government. Do you disagree?

7 MS. SOWLES: No. I mean, that's -- if she has  
8 complaints, she should file an opposition. That's the  
9 appropriate --

10 THE COURT: I have no doubt she will.

11 MS. SOWLES: Yeah.

12 THE COURT: But I just want to make sure that that  
13 is -- at least from your perspective. I'm going to hear hers,  
14 Ms. Poletto's, in a minute. But from the government's  
15 perspective, you believe that's how this ought to proceed?

16 MS. SOWLES: Yes, your Honor.

17 THE COURT: Ms. Poletto, do you object to that  
18 process?

19 MS. POLETT0: If that's your Honor's guidance, we  
20 agree with it.

21 Your Honor, I just for the record would like to state  
22 our preference is -- is that, you know, the government would  
23 have to -- you know, we don't think they've met their  
24 obligation. We don't think they've -- they've answered the  
25 FOIA request. But if you would like that in an opposition

1 motion, you know, we'll follow your Honor's guidance.

2 Our -- our request would be, however, your Honor,  
3 that, you know, a proper briefing schedule be set. And also we  
4 have asked the government for a *Vaughn* index, which they have  
5 not provided.

6 THE COURT: All right. What is the obligations to  
7 provide one at this point?

8 MS. SOWLES: Okay. With regard to that, as we said,  
9 we just completed our production. And as we indicated, we did  
10 not move for summary judgment yet on that because it's the  
11 plaintiff is -- we're -- because there are 33,000 pages, we  
12 would hope that she would be able to narrow it. For instance,  
13 many of the pages that were redactions are based on  
14 exemption 3, on grand jury information. And that's -- you  
15 know, it's -- I mean, we can't see how it's hard to contest.

16 But we believe that -- you know, that's not what we're  
17 seeking partial summary judgment on at this time. And if she  
18 would like to contest some of the withholdings, she should  
19 identify those that are -- as we hope we can narrow it.

20 And if we can't narrow it, then what we would  
21 recommend, that in cases like this where there's some  
22 substantial amount of documents, that we do a sampling. And we  
23 would, you know, do that as far as the *Vaughn* --

24 THE COURT: Well, here's what I'll do. You need to  
25 meet and confer on the -- it's called a *Vaughn* index?

1 MS. SOWLES: Right.

2 THE COURT: All right. I learn something every day.

3 What is a *Vaughn* index?

4 MS. WAWZENSKI: It's the -- it's the list of  
5 exemptions that we have invoked on documents that we have  
6 either withheld or redacted.

7 THE COURT: Okay. So it's similar to a privilege log,  
8 only -- is there a case called *Vaughn* or something?

9 MS. WAWZENSKI: Right, yes.

10 MS. SOWLES: Right. That was the original case they  
11 did it.

12 And for the FBI, there's -- the way that they do it  
13 is, again, through a declaration, and that -- alongside the  
14 documents, there is an indication as to, you know, the  
15 exemptions claim so that the FBI -- and usually Mr. Hardy, you  
16 know, discusses that, you know, he -- you know, that these --  
17 these pages were withheld on exemption 7(E), and then he  
18 explains the basis and then the -- and in his declaration, he  
19 footnotes those.

20 MS. WAWZENSKI: And then typically it is for the  
21 plaintiff to then determine which of those exemptions they're  
22 going to contest.

23 MS. SOWLES: Right.

24 MS. WAWZENSKI: Because sometimes there are some  
25 exemptions that they do not contest, and other times there are

1 exemptions that are contested. And that's what we discussed  
2 about narrowing what is really --

3 MS. SOWLES: Right.

4 MS. WAWZENSKI: -- at issue with regard to the  
5 exemptions.

6 MS. SOWLES: And in this case, because of the volume,  
7 she also knows, you know, based on the redactions and on the  
8 pages we withheld in full -- again, we stated the basis for  
9 that so that we would hope that she narrows it. And once she  
10 narrows it, then we would submit a *Vaughn* index supporting the  
11 basis for those exemptions in more detail.

12 THE COURT: All right. Well, Ms. Poletto, I'm going  
13 to simply ask you meet and confer with the government on that.  
14 If you believe that the -- their obligation to produce a *Vaughn*  
15 index is something they haven't complied with, after you've met  
16 and conferred and tried to work out a basis to narrow what is,  
17 in effect, sounds like, a privilege log under another name,  
18 then come in again and move to compel.

19 I'm not encouraging that. I hope you can reach an  
20 agreement on this.

21 The fact that what you say is what usually happens is  
22 not necessarily what the law requires; it's just the practice  
23 on these cases. I don't know.

24 And I -- Ms. Poletto, I don't know -- I haven't had a  
25 FOIA case go this far before. I'm not sure I had one, period,



1 but I certainly haven't had one go this far before. So I can't  
2 tell you what the practice is, and I can't tell you what the  
3 law is.

4 But I -- I think what the government says relating to  
5 trying to get a sample on this when there's so many documents  
6 sounds like a sound practice, but I'm not compelling it.  
7 It's -- I'm going to rely on both of you to -- both sides to  
8 meet and confer on this.

9 And if you can't reach agreement, Ms. Poletto, you're  
10 free to come in and move to compel, and I'll hear what the  
11 government says in response to it. I hope it doesn't come to  
12 that.

13 As to the partial motion for summary judgment, I know  
14 this may have happened sooner than you thought, Ms. Poletto. I  
15 will give you as much time as you want to respond to it. I  
16 know that summer is a tough time because of a variety of other  
17 schedules. But you tell me how much time you want to respond.  
18 Or if you need to consult with your client or with your  
19 colleagues, I'll give you time to contact my courtroom deputy  
20 with a date where you'd respond. And I'd give the government X  
21 amount of dates after that.

22 Are you prepared at this point to talk about when you  
23 want to respond?

24 MS. POLETT0: I think I have to consult with my  
25 client, your Honor, just to make sure I understand her

1 schedule. I'm happy to get back to your court within the next  
2 hour or two. I just need to check in with her.

3 THE COURT: That's fine. I -- certainly I assume it's  
4 going to be at least 30 days or some -- it might even be longer  
5 than that.

6 MS. SOWLES: Yeah. I would --

7 MS. POLETTTO: Yes.

8 MS. SOWLES: -- just want to make sure that whatever  
9 date she chooses, that because I have some other conflicts  
10 and -- you know, and hopefully a planned vacation in --  
11 sometime in August that we could work around that.

12 THE COURT: Well, here's what I'll do. Why don't  
13 you -- Ms. Poletto, why don't you contact Ms. Sowles after  
14 you've talked to your client, whether you do that today or  
15 tomorrow. Then contact my courtroom deputy with an agreed  
16 briefing schedule.

17 MS. SOWLES: That sounds like a good plan.

18 THE COURT: Is that okay with you, Ms. Poletto?

19 MS. POLETTTO: It is. Thank you, your Honor.

20 THE COURT: All right. Let's do it that way.

21 I'll set you for a status about 60 days after the last  
22 brief is in, with the hope I can give you a ruling by then. If  
23 we have a ruling earlier, you'll get it in the mail. If it's  
24 not ready in 60 days, I'll have you in for a status.

25 Neither counsel, Ms. Sowles or Ms. Poletto, is

1 required to come in from Washington or New York. Do it by  
2 phone. And I'll explain sheepishly why I don't have a ruling.  
3 But I think that's the route to go.

4 You have mechanisms if you believe orders haven't been  
5 followed or a *Vaughn* index hasn't been produced when you  
6 believe there's a requirement to produce it. The mechanism is  
7 file a motion.

8 So anything else? First on the phone. Ms. Poletto,  
9 anything else from your end?

10 MS. POLETTTO: No. Thank you, your Honor.

11 THE COURT: Anything else from the attorneys in court?

12 MS. SOWLES: No, your Honor.

13 THE COURT: Okay.

14 MS. WAWZENSKI: Thank you, your Honor.

15 THE COURT: Thank you all.

16 (Concluded at 9:58 a.m.)

17 C E R T I F I C A T E

18 I certify that the foregoing is a correct transcript, to  
19 the extent possible, of the record of proceedings in the  
20 above-entitled matter, given the limitations of conducting  
21 proceedings via telephone.

22  
23 /s/ LAURA R. RENKE  
24 LAURA R. RENKE, CSR, RDR, CRR  
25 Official Court Reporter

July 12, 2019